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In the

Supreme Court of the United States

OCTOBER TERM, 1966

GERALD TOMASZCK and
JOSEPH D'ARGENTO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUBJECT INDEX

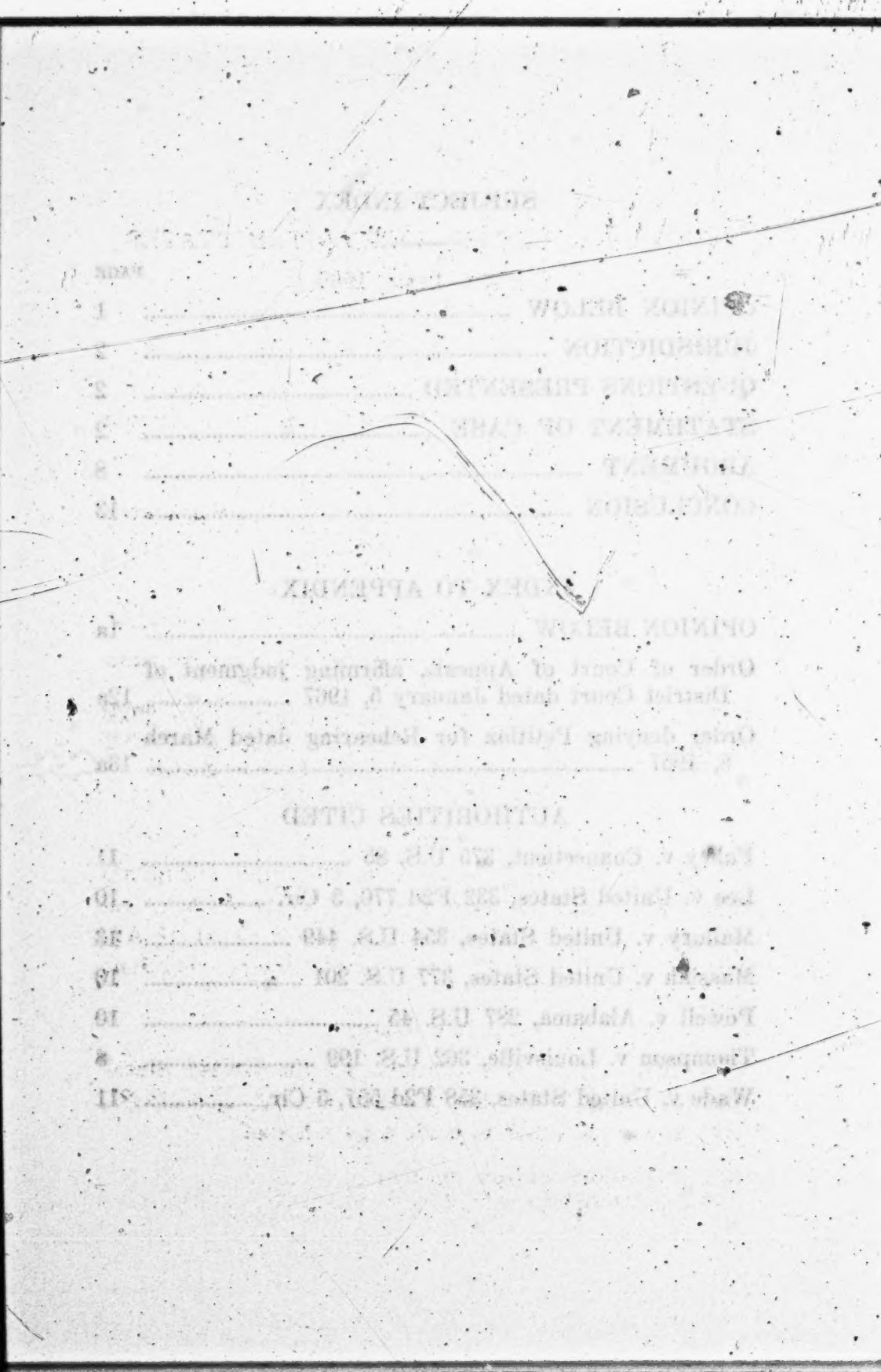
	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF CASE	2
ARGUMENT	8
CONCLUSION	13

INDEX TO APPENDIX

OPINION BELOW	1a
Order of Court of Appeals, affirming judgment of District Court dated January 5, 1967	12a
Order denying Petition for Rehearing dated March 8, 1967	13a

AUTHORITIES CITED

Fahey v. Connecticut, 375 U.S. 85	11
Lee v. United States, 332 F2d 770, 5 Cir.	10
Mallory v. United States, 354 U.S. 449	13
Massiah v. United States, 377 U.S. 201	10
Powell v. Alabama, 287 U.S. 45	10
Thompson v. Louisville, 362 U.S. 199	8
Wade v. United States, 358 F2d 557, 5 Cir.	11



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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Gerald Tomaszck and Joseph D'Argento respectfully pray that a writ of certiorari issue to reverse the judgments of the United States Court of Appeals for the Seventh Circuit affirming their convictions for bank robbery.

Opinion Below.

The only opinion is that issued by the United States Court of Appeals for the Seventh Circuit, Nos. 15287, 15289, a copy of which is made a part hereof.

Jurisdiction.

Jurisdiction is invoked on the grounds that the conviction of the defendants Gerald Tomaszck and Joseph D'Argento is in violation of their rights under the due process clause of the Fourteen Amendment and the Sixth Amendment to the Federal Constitution and Title 38, § 1254, U.S.C.A.

The date of the judgments and the time of their entry is March 8, 1967. Petitions for Rehearing were denied March 8, 1967.

Questions Presented.

1. Did the conviction of Tomaszck rest on any evidence at all?—Thus, were the rights of said defendant violated under the due process clause of the Fourteenth Amendment?

2. Did the placing of the defendants in a special show-up following their arrest pursuant to a suppressed indictment violate defendants' rights under the Fourteenth and Sixth Amendments to the Federal Constitution and Rule 9(c), Federal Rules of Criminal Procedure?

Statement of Case.

Defendants Gerald Tomaszck and Joseph D'Argento agree that the factual situation as set forth in the opinion of the United States Court of Appeals for the Seventh Circuit is correct. The following statement of facts is necessary only to give in more detail the exact physical location of the residence located at 3115 Dora Street and the residence of the Government's witness Jean Hauger located at 3101 Sarah Street.

On September 23, 1963, at approximately 11:30 a.m., four masked men entered the Franklin Park bank in Franklin Park, Illinois, robbed the bank, and then entered

an automobile being driven by a fifth man which was parked in close proximity to the bank and made their escape. Shortly thereafter four men were observed getting out of a black Chevrolet in an alley running north and south that separated Dora Street to the west, also running north and south, and Sarah Street to the east, also running north and south, bounded by Minneapolis Street on the south, running east and west, and Belmont Street on the north, running east and west. The car stopped opposite a garage to the rear of 3115 Dora Street which is located on the east side of Dora Street and four doors north of Minneapolis. One man was observed jumping the east fence of the alley and proceeding east. The other three men went west and the car apparently entered the garage on the west side of the alley behind 3115 Dora Street (Bf. 2). The bank is located about a mile and a half—maybe a mile—from this residence.

Government's witness Hauger resided in her home located at 3101 Sarah Street located at the northeast corner of Minneapolis and Sarah Streets which, therefore, lies in a southeasterly direction from the residence at 3115 Dora Street. Close to the noon hour, about 11:45 a.m. (A. 27), or about noon (A. 28), while she was in her kitchen in the southwest part of her home, she saw Tomaszek walk south on Sarah Street in front of her home and then saw him walk in an easterly direction on Minneapolis through the south window of her home. She saw the profile of the man—he was not running or hurrying.

A search of the house at 3115 Dora Street disclosed an M-1 carbine rifle, a pair of gloves and a "Ballantine" carton. In addition the police found a coat, Government's

Exhibit 4, which the Government conceded could only have been worn by the man they contended was Tomaszck (Bf. 9, A. 29, Pet. for Reh. 2-3). Government's Exhibit 9, a raincoat, which the Government conceded could have only been worn by the defendant LaJoy, was found in a backyard east of the alley (A. 29-31).

Government's witness, Police Officer John Hinchy, testified that he had seen defendants Tomaszck and Schang together in a restaurant on July 11, 1962 (more than fourteen months before the crime).

The trial court at the close of the Government's case stated (A. 32):

> "I was concerned throughout the trial about the defendant Tomaszck. You want to go ahead and answer Mr. Whalen?"

and

> "These two, the defendant Tomaszck and the defendant Jean Schang, worry me a great deal, as I have said, I just cannot jump to a conclusion; I just cannot jump. But I do not want to hold up the arguments because I want you to go ahead and make time."

At the close of the Government's case the following colloquy occurred between the attorney for the Government and the Court (A. 29-32):

> "The Court: Mr. Zvetina, isn't is true that the evidence indicates that the person who was allegedly identified by the bank president,—what is his name?
>
> Mr. Zvetina: Mr. Beck.
>
> The Court: Mr. Beck, and he pointed out the defendant Gerald Tomaszck, was standing some eight to nine feet in front of him across the counter—what is the name of it?
>
> Mr. Zvetina: No. 8.

The Court: No. 8 did not wear a raincoat?

Mr. Zvetina: Oh, there is no question about that, your Honor. The raincoat was placed on a man near the door, the shorter man.

The Court: Yes. And isn't it true that your circumstantial set of facts, assuming them to be true as Mr. Whalen has said—

Mr. Zvetina: Yes?

The Court: As relating to Tomaszek as being the same person who was seen crossing in front of the kitchen of Mrs. Smith and cutting across around the corner of the yard of Mr. Hauger, relates to the raincoat that was found in the yard?

Mr. Zvetina: Not necessarily, your Honor.

The Court: And would naturally have to have been that which was worn by Mr. Tomaszek?

Mr. Zvetina: No, your Honor. First of all, it must be recalled, the circumstances that are significant is where these items were found.

Now, as counsel correctly pointed out, Leonard Wood testified that one man went over a fence to the east.

Officer Warfield testified to finding the raincoat, gloves, and the silver .25 caliber in the pocket near the fence. This is in the back of the yard, near the fence.

The coveralls with another gun, a loaded .38—and certainly we don't assume that one individual was packing two guns—the loaded .38 and the coveralls were found out between the houses towards the front. You remember, there was an evergreen bush or something out towards the front of 3114. And he found the coveralls and the loaded .38 up by the bush towards the front of 3114 between the houses."

"The Court: According to your theory of the evidence, who was whom?

Mr. Zvetina: According to our theory of the evidence, the man who went over the fence—

The Court: Who was whom in the bank?

Mr. Zvetina: Well, according to the testimony, your Honor, the man who stood in front of the counter resembled in stature and posture and glasses the defendant Tomaszck.

However, I don't think it is 100 per cent essential that we identify who was who in the bank.

The Court: Who stayed at the door?

Mr. Zvetina: Defendant LaJoy. All the testimony would indicate that the short man, the short man approximately my height, was the man near the door. He had the raincoat and some sort of a hat.

The Court: And if he had the raincoat, why would the raincoat not have been found in the house rather than behind the bushes going in the other direction?

Mr. Zvetina: Assuming, your Honor, this was a casual affair when they arrived at the scene, this would have been likely. All this incriminating evidence would never have gotten outside the house. They all would have gone in and undressed calmly.

But here we have a panic situation, and obviously, the leaving of coveralls or raincoat with a loaded gun is not the kind of thing that a criminal would normally do unless there were some kind of a panic situation. He is not going to leave this around out in the open to be found.

This is like jettisoning something from a sinking ship. And you just heave it over.

The Court: Who picked up the raincoat and went out the other direction with it while Mr. LaJoy allegedly—

Mr. Zvetina: Nobody did.

The Court: —was seen coming out of the house, out of the—

Mr. Zvetina: Nobody did, your Honor. It is our theory, you will recall that Wood testified the car pulled in the alley going rapidly, the car stopped and then went quickly into reverse; people are scattering from the car. He sees one man go over the fence to the east. But there is certainly nothing to prevent someone from jettisoning his coat with the guns and gloves.

The Court: Who did that?

Mr. Zvetina: Well, I don't know who actually did it, your Honor.

The Court: You have just so many men. Three of them came out of the house.

Mr. Zvetina: Yes, your Honor."

Two alibi witnesses testified on behalf of Tomaszck.

On September 26 the suppressed indictment was returned, on September 27 at 4:00 a.m. the agents arrested Tomaszck and left his home (A. 3-4), at 8:45 a.m. they arrived at the FBI Headquarters (A. 6), at 9:30 a.m. Tomaszck's attorney called the FBI Headquarters and demanded to see him (A. 12)—the agent admitted receiving the call at that time but had no recollection of the demand to see Tomaszck (A. 16). Joseph D'Argento was arrested in his home at about the same time. At 9:57 or 9:58 a.m. Tomaszck and D'Argento were placed in a showup (A. 5). Witness Hauger was present. Tomaszck and D'Argento were required to repeat the following phrases: "This is a stickup," "Get down on your knees," "Where's the money," and two more phrases (A. 5).

ARGUMENT.

I.

THERE WAS NO EVIDENCE AT ALL TO CONVICT TOMASZCK—THUS, HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WERE VIOLATED.

A conviction resting on no evidence at all violates defendant's rights under the due process clause of the Fourteenth Amendment, *Thompson* v. *Louisville*, 362 U.S. 199.

Defendant Tomaszck was not identified as being in the bank, leaving the bank, getting in the get-away car, being in the get-away car, or getting out of the get-away car, nor were any proceeds of the robbery found on his person. The trial court's grave concern about whether his case should go to the jury was well justified (Pet. for Cert. 4).

Defendant Tomaszck was seen entering a restaurant with a co-defendant more than fourteen months before the crime was committed (Pet. for Cert. 4). He was also observed walking south on the east side of Sarah Street and then east on the north side of Minneapolis by a resident residing at the northeast corner of Sarah and Minneapolis close to the noon hour, about 11:45 a.m., or about noon, on the day of the crime. Defendant Tomaszck submits that this testimony standing alone has no probative value, and this is all the testimony that could possibly link this defendant with the bank robbery.

There was no evidence upon which a conviction could rest. The Government, however, did have a theory—a

theory that puzzled the trial court (Pet. for Cert. 4-7). The Government theorized that since (1) the automobile apparently used in the robbery entered the alley that separates Sarah and Dora Streets and came to a stop at the rear of 3115 Dora Street, and (2) an unknown man was observed getting out of the automobile and jumping the fence at the east side of the alley, and (3) Tomaszck was seen in front of the northeast corner of Sarah and Minneapolis, that Tomaszck is the same man that got out of the automobile.

This theory, however, was refuted by the Government's own exhibits. Government's Exhibit 9, a raincoat, which the Government conceded could only have been worn by defendant LaJoy (A. 29-31) was found in the yard east of the alley and to the rear of 3115 Dora into which an unidentified man having left the car had entered. A search of the home at 3115 Dora revealed, in addition to articles mentioned in the opinion of the Court of Appeals, Government's Exhibit 4 which was not mentioned in the opinion. This omission was called to the Appeals Court's attention in Tomaszck's Petition for Rehearing. The Government admitted that Government's Exhibit 4 could only have been worn by Defendant Tomaszck.

There was no evidence at all to convict Tomaszck.

II.

THE COMPULSORY EXHIBITION OF THE PERSONS AND VOICES OF DEFENDANTS TOMASZCK AND D'ARGENTO IN A LINEUP FOLLOWING A SUPPRESSED INDICTMENT PURSUANT TO THE GOVERNMENT'S PLANS TO CONDUCT IT SO THAT ATTORNEYS WOULD NOT BE GIVEN AN OPPORTUNITY TO ATTEND VIOLATED DEFENDANTS' RIGHTS TO THE EFFECTIVE AID OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The argument is twofold. First, it violates the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime condemned in *Massiah* v. *United States,* 377 U. S. 201, 205. Second, in this particular case counsel could have rendered effective aid that was lost forever to these defendants. At the lineup some of the witnesses picked out agents in the lineup as having similarities to the persons that they associated and connected with the robbery of the Franklin Park bank (A. 17). During the trial defendants' requests for the names of these witnesses were denied by the Court (A. 17). A written motion filed by the defendants for the names of these witnesses was also denied by the Court. Defendants were thus deprived of useful testimony. An attorney could well have obtained the names of these witnesses if he were present. The right of counsel extends to the preparation for trial as well as the trial itself, *Powell* v. *Alabama,* 287 U. S. 45. The constitution gives a defendant the absolute right to counsel starting no later than after his indictment, *Lee* v. *United States,* 322 F. 2d 770, 778, 5 Cir. (1963).

There was a reasonable possibility that the viewing of the persons and the hearing of the voices of the defendants at the lineup might have contributed to the convictions and

the error therefore was not harmless, *Fahey* v. *Connecticut*, 375 U. S. 85; *Wade* v. *U. S.*, 358 F2d 557, 5 Cir. Jean Hauger is the only witness upon whose testimony Tomaszck's conviction could possibly rest. Between 11:45 a.m. and 12:00 p.m. she did see a man walking south on Dora, on the east side of Dora, in front of her house who was not walking hurriedly (A. 27-28). She then saw this man walk east on Minneapolis while she was preparing lunch and only saw the profile of the man (A. 28). The following day when shown pictures of Tomaszck by agents she could not describe, she said that the pictures resembled the man she saw walking by her home (A. 28). While being transported to the showup four days later she was told by the agents that arrests had been made and she might have been told that some people were indicted (A. 28). She then identified Tomaszck at the showup as the man she saw walking by her home. D'Argento's conviction rested upon testimony of witnesses who attended the lineup. Government witnesses testified as follows: William Tamir—D'Argento resembled one of the robbers he saw in the bank; Mrs. Sampson—D'Argento looked like one of the men who left the house at 3115 Dora but she could not positively identify any of the men and that she had seen pictures of the defendants in the newspaper after the return of the indictment; Parker—she saw D'Argento running through her backyard across the street from 3115 Dora and that he had a scar as big as a thumbnail on his face.

III.

THE FAILURE OF THE AGENTS TO BRING TOMASZCK AND D'ARGENTO PROMPTLY BEFORE THE COURT VIOLATED RULE 9(c), FEDERAL RULES OF CRIMINAL PROCEDURE.

The agents entered Tomaszck's home at 4:00 a.m. on September 27, 1963, and he was immediately placed under

arrest. They left the house about 8:00 a.m. (A. 3). They arrived at the Bureau Headquarters about 8:45 a.m. (A. 6). The showup lasted from 9:57 - 9:58 a.m. until about 10:25 a.m. (A. 5). The procedure was about the same for D'Argento.

Rule 9(c), Federal Rules of Criminal Procedure provides that the officer executing the warrant shall bring the arrested person promptly before the court, or for the purpose of admission to bail, before a commissioner. Bail having already been set in the indictment there remained only the duty to bring the defendants promptly before the court.

Research has failed to disclose a single case interpreting Rule 9(c) where the arrest is pursuant to a suppressed indictment.

"Promptly" is an adverbial form of the word "prompt" which means ready and quick to act as occasion demands, Black's Law Dictionary, P. 1379. The same work defines "prompt" as follows: to act immediately, responding on the instant. There was a definite reason to use the word "promptly" in the rule. In Rule 5(a), Federal Rules of Criminal Procedure, referring to the situation where an arrest is made without a warrant or under a warrant issued upon a complaint, the person making the arrest "shall take the arrested person without unnecessary delay before the nearest available commissioner;" that the reason Rule 5(a) provides for some delay is that probable cause has not been determined as yet, and some delay may very well be for the benefit of the arrested person. However, where a man has been indicted the issue of probable cause has already been determined; that any delay is not for the benefit of the arrested person, and it thereupon becomes the duty of the agents to take the arrested person promptly

without any delay to the court under Rule 9(c), Paragraph (1).

The rights of the defendants were violated. The court should apply an exclusionary rule against all persons appearing at the showup from testifying at the trial, *Mallory* v. *United States*, 354 U. S. 449 (1957).

CONCLUSION.

For the reasons advanced defendants Gerald Tomaszck and Joseph D'Argento request that the judgments entered be reversed or, in the alternative, that they be reversed and the cause remanded for a new trial.

Respectfully submitted,

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